UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT EARL QUIRION	)	
	)	
Movant	)	
	)	
v.	)	Civil No. 05-06-B-W
	)	Criminal No. 03-21-B-W
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Robert Quirion has filed a 28 U.S.C. § 2255 motion challenging his 2003 federal sentence as an armed career criminal. Quirion, who did not take a direct appeal, posits two grounds. He charges his attorney with delivering ineffective assistance because he did not argue that two of the convictions used as a predicate of his armed career criminal status had been consolidated for sentencing and therefore should not count as two separate offenses. His other ground is that his sentence violates his Sixth Amendment right to a jury trial as articulated in Blakely v. Washington, 542 U.S. __,124 S. Ct. 2531(2004). After Quirion filed this petition the United States Supreme Court extended the holding of Blakely to the United States Sentencing Guidelines, see United States v. Booker, 543 U.S. __, 2005 WL 50108 (Jan. 12, 2005). For the reasons below I recommend that the Court summarily **DISMISS** this petition because neither ground has any merit as a matter of law.

Discussion

Ineffective Assistance of Counsel Claim

In support of his ineffective assistance ground, Quirion submits documentation from the sentencing proceeding on two criminal matters in this court: Crim No. 92-09-B-B and Crim No. 93-06-B-B. The 1992 case charged Quirion with three counts: Bank robbery in violation of 18 U.S.C. § 2113(a), falsifying an ATF form to acquire a firearm, in violation of 18 U.S.C. § 922(a)(6) and § 924(a), and receipt of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1) and § 924(a). The 1993 case bore a single count for armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d).

Quirion also submits an excerpt from his 2003 presentence investigation report. Under the heading of offense level computations the probation officer who prepared this report indicates: "pursuant to U.S.S.G. 3D1.2(d) convictions for separate counts of bank robbery are never grouped. However, this officer concludes that the charges in Counts Two and Three of 92-00009-B should be grouped with 92-00006-B pursuant to U.S.S.G. 3D1.2(c)." In the criminal history portion of the report the 1992 and 1993 cases are listed as two different offenses and the report indicates, as relevant, "The defendant had these cases consolidated for sentencing purposes only. The incidents were separate and distinct, each carrying it[]s own docket number."

In the 1993 sentencing memorandum the court found vis-à-vis the impact of these two cases on Quirion's base offense level: "Pursuant to United States Sentencing Commission Guideline ... 3D1.2, convictions for separate counts of bank robbery are never grouped. However, the charges in Counts Two and Three of Criminal No. 92-9-B are grouped with the charge contained in 93-6-B. Guideline 3D1.2(c)."

It is Quirion's assertion that his counsel should have argued that the sentencing judge's grouping of two of the three counts from the 92-09-B case with the count in 93-6-B case had the legal effect of consolidating the two cases for sentencing purposes and, thus, "disqualified" the two prior convictions from being treated as unrelated for purposes of U.S.S.G. § 4B1.1(b). Accordingly, in Quirion's view, his sentencing as a career offender was in error and it was incumbent on counsel to make this argument.

Quirion attaches the letter from his attorney to the probation officer preparing the 2003 presentence investigation report. In that letter his attorney challenged Quirion's career offender status, indicating that the 92-09 and 93-06 cases should be characterized as involving the same course of conduct. He did not speak to the relatedness concern. Quirion also faults the prosecuting attorney in his 2003 case for "glossing over" the 1993 consolidation issue, instead of focusing on the "single common scheme or plan" inquiry.

Quirion was a career offender under U.S.S.G. § 4B1.1 if; one, Quirion was over the age of eighteen; two, his 2003 offense was a felony that was either a controlled substance violation or a crime of violence and; three, Quirion had two prior convictions of either a crime of violence or an applicable controlled substance violation. Guideline 4A1.2(a)(2) provides: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c)."

Apropos relatedness arguments such as Quirion's, the First Circuit has explained:

> In United States v. Elwell, 984 F.2d 1289 (1st Cir.1993), we intimated that a mere coincidence in timing, without more, is not enough to justify treating convictions that do not possess common antecedents as having been consolidated for purposes of sentencing. See id. at 1296 n. 7 (explaining that such convictions cannot be "deemed 'constructively' consolidated because of ... [a] plea bargain and concurrent sentences")

> (dictum). We now transform the Elwell adumbration into an express holding: at least in respect to offenses that are temporally and factually distinct (that is, offenses which occurred on different dates and which did not arise out of the same course of conduct), charges based thereon should not be regarded as having been consolidated (and, therefore, "related") unless the original sentencing court entered an actual order of consolidation or there is some other persuasive indicium of formal consolidation apparent on the face of the record which is sufficient to indicate that the offenses have some relationship to one another beyond the sheer fortuity that sentence was imposed by the same judge at the same time.

United States v. Correa, 114 F.3d 314, 317 (1st Cir. 1997); accord United States v. Damon, 127 F.3d 139, 147 (1st Cir. 1997).

Looking at both the record of the 1993 sentencing and Correa, 114 F.3d at 317 - 18 (adopting a categorical approach to the analysis of prior convictions for relatedness), it is beyond question that Quirion's 1992 and 1993 cases were not consolidated within the meaning of Correa. No formal order of consolidation was entered by the presiding judge and the mere fact that the probation officer used the term "consolidated" in preparing the presentence investigation report does not suffice as "other persuasive indicium of formal consolidation." It is for the court and not the probation officer to make the consolidation determination. What is more, the court expressly noted that the two bank robbery counts could not be grouped. Had counsel at the 2003 sentencing made such a relatedness argument he would have been quickly and correctly rebuffed.

Sixth Amendment Right to Jury Trial

In Apprendi v. New Jersey, the United States Supreme Court concluded that the due-process and jury-trial guarantees in the United States Constitution require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). In Blakely the Court applied

Apprendi to a state determinate sentencing provision that had analytical resonance with the federal sentencing scheme. Thus, Quirion's belief that Blakely (cum Booker), might offer him succor.

With respect to the merits[1] of this ground, Quirion is out of luck for two reasons. On the same day that Blakely was handed down, the United States Supreme Court concluded that one of Blakely's direct ancestors, Ring v. Arizona, 536 U.S. 584 (2002) -- which applied the principle of Apprendi to death sentences imposed on the basis of aggravating factors -- was not to be applied retroactively to cases once they were final on direct review. See Schriro v. Summerlin, __ U.S. __, 124 S. Ct. 2519, 2526 (2004) ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In the wake of Blakely, most courts that considered the question have concluded that Summerlin answered the retroactivity question in the negative vis-à-vis Blakely grounds pressed in timely 28 U.S.C. § 2255 motions. See, e.g., Burrell v. United States, 384 F.3d 22, 26 n.5 (2d Cir. 2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether Apprendi applied retroactively); Lilly v. United States, 342 F.Supp.2d 532, 537 (W.D. Va. 2004) ("In Summerlin, the Court found that Ring v. Arizona, 536 U.S. 584 (2002), a case that extended Apprendi to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that Blakely announced a new procedural rule and is similarly non-retroactive.") (citation omitted); accord Orchard v. United States, 332 F. Supp, 23 275 (D. Me. 2004); see also cf. In re Dean, 375 F.3d 1287,

[1] As mentioned, Quirion did not take a direct appeal and this Sixth Amendment challenge is the type of challenge that should have been pursued through a direct appeal. Quirion attributes this default to his status as a lay person and his counsel's ineffectiveness.

1290 (11th Cir. 2004) ("Because Blakely, like Ring, is based on an extension of Apprendi, Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, Dean's proposed claim fails to satisfy the statutory criteria [for filing a second or successive § 2255 motion].").

The 'merits majority' in Booker expressly affirmed the holding of Apprendi concluding: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." __ U.S. at __, 2005 WL 50108, at *15; see also Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003) ("We hold, without serious question, that Apprendi prescribes a new rule of criminal procedure, and that Teague does not permit inferior federal courts to apply the Apprendi rule retroactively to cases on collateral review."). The fact that Booker applied Apprendi to the United States Sentencing Guidelines, as opposed to a state capital sentencing scheme, would not shift the tectonic plates of the Summerlin retroactivity analysis. What is more, Quirion is challenging the imposition of a sentence based on prior convictions and Booker expressly reaffirmed the carving out of prior-convictions from the Apprendi Sixth Amendment mandate. See United States v. Stearns, 387 F.3d 104, 107 (1st Cir.2004) (concluding that Blakely does not support challenge to sentences enhanced due to prior convictions).

Conclusion

For these reasons I recommend that the Court **DENY** Quirion's 28 U.S.C. § 2255 motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

January 14, 2005.

QUIRION v. UNITED STATES OF AMERICA
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Related Case: 1:03-cr-00021-JAW
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 01/11/2005
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Petitioner

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